2013 IL App (2d) 130118-U
No. 2-13-0118
Order filed December 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NOMAN RAFIQUE,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	2010-L-0306
	)	
IMRAN KHAN[1]	)	Honorable
	)	Kenneth L. Popejoy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment in favor of defendant and against plaintiff was reversed where the trial court's finding that the presumption of consideration had been overcome was against the manifest weight of the evidence; the cause was remanded for further proceedings.

¶ 2

¶ 3 Plaintiff, Noman Rafique, appeals from an order of the circuit court of Du Page County finding in favor of defendant, Imran Khan, following a bench trial. Plaintiff sued to recover the principal balance and interest allegedly due on a "balloon note" that defendant

[1] The pleadings spell plaintiff's first name "Norman" and defendant's first name "Irman." The spellings were corrected at trial.

signed in connection with the purchase of a gas station. The trial court ruled that there was no consideration for the note. For the reasons that follow, we reverse the trial court's judgment and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 Defendant, Farhan Siddique, and Zia Ahmed desired to purchase a gas station in Normal, Illinois. To further that venture, defendant incorporated Algonquin Petroleum AP, Inc. (the corporation) and was its registered agent. Income tax returns in evidence showed that defendant owned 33% of the company, Ahmed owned 33%, and Siddique owned 34%. Defendant signed the purchase agreement for the gas station individually and not as an agent of the corporation. The closing occurred on March 8, 2004. Prior to closing, Siddique sought funds for the purchase of the gas station from plaintiff, his brother. Because Siddique had no experience running a gas station, plaintiff required a personal guaranty before he would loan Siddique the funds. On March 4, 2004, at Siddique's suggestion, defendant, individually and not as a representative of the corporation, executed a "balloon note" (the note) in the amount of $100,000 in favor of plaintiff. The note named defendant as "borrower" and plaintiff as "lender." The note recited that defendant promised to pay plaintiff $100,000 plus interest in return for a loan defendant had received. The terms of the note required defendant to pay plaintiff interest in monthly installments of $2,000 for 12 months, at which time the full principal was due. The note also required defendant to execute a subordinate mortgage on the gas station property as security for the note. Following the execution of the note, plaintiff sent Siddique a check for $100,000 (the check),

payable to Siddique. Defendant, who had been unemployed, went to work at the gas station as a salaried employee. Ultimately, the gas station was not successful, and defendant did not pay the balance due on the note. Plaintiff sued defendant for breach of the promissory note. Defendant raised the affirmative defense of lack of consideration. Evidence at trial showed the following.

¶ 6

Siddique testified that defendant signed the note in front of a notary at a currency exchange next door to his real estate office. According to Siddique, he faxed the signed note to plaintiff, who then sent the check to Siddique. Siddique testified that he endorsed the check and gave it to defendant, telling defendant it was a loan to defendant from plaintiff. Siddique denied that he was present at the closing of the purchase of the gas station. On cross-examination, Siddique testified that plaintiff refused to give him the money, because he had no experience running a gas station. According to Siddique, he contributed $50,000 from his personal bank account at closing. He had no documentation to prove his $50,000 contribution. Siddique said he had no personal knowledge of what checks were brought to the closing.

¶ 7

Defendant testified that he signed the note because Siddique told him that plaintiff "might give him money." Defendant denied that he ever spoke to plaintiff about the note. According to defendant, he signed the note in the car on the way to Normal. Defendant admitted that he signed the note and the purchase agreement for the gas station individually

and not as a representative of the corporation. Defendant denied that Siddique gave him the check, and he did not recall whether he ever saw the check before the closing. Defendant testified that Siddique might have shown him the check at closing, but he could not recall. According to defendant, Siddique was present for the entire closing. Defendant testified that he brought $45,000 or $50,000 to the closing in the form of a cashier's check. He recalled that Ahmed brought $100,000 and Siddique brought either $125,000 or $130,000. Defendant stated that he was not sure if plaintiff's $100,000 was used to purchase the gas station, because there were other ventures in which he, Ahmed, and Siddique were investing. Plaintiff's attorney then read paragraph 17 of defendant's verified amended answer and affirmative defense into the record, in which defendant had stated that Siddique tendered approximately $100,000 at closing from funds that originated from plaintiff. When asked at trial if the money Siddique brought to the closing benefitted himself, defendant answered, "Yes, of course. As a corporation, it benefits everybody, yes." According to defendant, in addition to the $45,000 he contributed at closing, he worked at the gas station earning $2,000 a month, and he invested another $15,000. Defendant testified that the corporation provided him with a car.

¶ 8

Zia Ahmed testified that he, defendant, and Siddique were equal partners. Ahmed and Siddique were both supposed to contribute $100,000 at closing, and defendant was to contribute less money because he was going to work at the gas station. According to Ahmed, defendant signed the note in the car. Ahmed testified that Siddique said that defendant had

to sign the note before plaintiff would give Siddique the money for the gas station. Ahmed understood that Siddique received $100,000 prior to the closing, but he never saw the check. Ahmed testified that Siddique was present at the closing and that Siddique contributed $100,000. The monies the partners contributed at closing were used to buy the gas station and for other ventures they were pursuing. Ahmed testified that the monies benefitted all three shareholders. Ahmed testified that defendant gave him corporate checks in the amount of $2,000 each month that Ahmed deposited into his personal bank account. Ahmed said that he then wired these funds to plaintiff. Ahmed denied that the payments were interest payments under the note. He testified that the payments were "investment profit," because plaintiff invested money in the business. According to Ahmed, there were 8 or 10 such payments.

¶ 9

Plaintiff testified that he met defendant at Siddique's home once and had a social conversation with him. Then, in March 2004, plaintiff spoke with defendant again after Siddique told plaintiff that defendant needed a job and wanted to buy a gas station. According to plaintiff, defendant asked him for a $100,000 loan to the business and agreed to make monthly payments of $2,000. Plaintiff testified that he told Siddique he would need someone's personal guaranty. After that conversation with Siddique, plaintiff received the signed and notarized note. In turn, plaintiff prepared and overnighted the check, which was to be used to purchase the gas station. Plaintiff testified that it was strictly a loan; he did not consider himself an investor. According to plaintiff, he expected that defendant, not

Siddique, would pay him back because defendant had signed the note. Plaintiff testified that he received monthly $2,000 payments from April through August 2004, and then he received payments in the amount of $1500 in September, October, and November 2004.[2] According to plaintiff, he had a conversation with defendant in which defendant explained that the business was not doing well, and plaintiff agreed to accept the lesser amount. Plaintiff testified that he received "almost" $13,500 and then the payments stopped. Plaintiff stated that defendant benefitted from the $100,000 that plaintiff gave to Siddique, because defendant had no job prior to the purchase of the gas station, and its purchase meant that defendant would be salaried and be president of the corporation. According to plaintiff, defendant "was the main guy who was running the show." Plaintiff said that he made the check payable to Siddique because he wanted to be sure that the money went toward the purchase of the gas station. Plaintiff testified that the check was cashed, and that Siddique had endorsed it, but he admitted that he was not present at closing and could not testify that his $100,000 was deposited at closing. The record shows that Siddique signed the back of the check and that it was deposited on the date of closing at Heartland Bank.

¶ 10

[2] Defendant denied knowledge of the payments. There are two checks in evidence in the amount of $2,000. Stipulated exhibit #6 was a handwritten check dated April 2004 and was made payable to plaintiff. The memo line says "May payment." Defendant testified that he first saw the check in going over the bank statement and said to Saddique, "You want this check?" Almost incredibly, the evidence did not establish who signed stipulated exhibit #6, but defendant said that he was not concerned about it when he saw it, because he thought the note was a "false document." The second check was stipulated exhibit #8 dated August 2004. The copy in the supplemental record is unreadable beyond the month and year of its making, the amount, and "signature not required."

The trial court ruled in a written memorandum opinion. The court found Siddique not credible and Ahmed very credible. The court found by a preponderance of the evidence that Siddique brought $100,000 or more to closing and that the money came solely from plaintiff. The court stated that defendant and Ahmed both testified that Siddique brought $100,000 to closing and that Siddique provided no evidence to the contrary. Although Siddique testified that he furnished $50,000 at closing, the court gave his testimony no weight. In a contradiction, the court also found that "it is totally unclear where the funds went after [plaintiff] sent the check payable to [Siddique]" and "what Siddique did with *** [the money] is unknown to this Court." The court found that none of the money benefitted defendant directly or indirectly so that there was no consideration for the note. The court based its finding of no consideration on the fact that the check went into an account to which defendant had no access, which was not a corporate account, and which had no relationship to the transaction involving the note. The trial court denied plaintiff's motion to reconsider and this timely appeal followed.

¶ 11 II. ANALYSIS

¶ 12

Plaintiff contends that the evidence proved that the $100,000 proceeds of the note were used at closing to purchase the gas station and to fund other ventures in which defendant was involved, resulting in a benefit to defendant. From this, plaintiff concludes that defendant did not rebut the presumption of consideration and that there was, in fact, consideration for the note. The appellate court will reverse a trial court's findings following a bench trial if they are against the

manifest weight of the evidence. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 41. A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Sheth*, 2013 IL App (1st) 110156, ¶ 41.

¶ 13 Consideration for a promissory note is rebuttably presumed and requires no proof other than the note itself. *M. Loeb Corp. v. Brychek*, 98 Ill. App. 3d 1122, 1125 (1981). Failure, or want, of consideration is an affirmative defense. *Brychek*, 98 Ill. App. 3d at 1125. Evidence offered to rebut the presumption must be of a very clear and cogent nature. *Levin v. 37th St. Drug & Liquors, Inc.*, 103 Ill. App. 2d 248, 253 (1969). The burden of proving an affirmative defense is on the one asserting it. *Baylor v. Thiess*, 2 Ill. App. 3d 582, 584 (1971). Thus, the question in our case is whether defendant presented "very clear" and "cogent" evidence to rebut the presumption of consideration.

¶ 14 The trial court found Siddique's testimony totally incredible and gave it no weight. Plaintiff was not present when defendant signed the note. That leaves defendant's and Ahmed's testimonies as to the events surrounding the signing of the note. Both defendant and Ahmed testified that Siddique presented the note to defendant while they were riding in a car. Ahmed testified that Siddique said the note was required by plaintiff before plaintiff would give Siddique $100,000. Defendant testified that Siddique told him to sign the note and plaintiff might give defendant money. Defendant admitted that he signed the note. It is

undisputed that Siddique faxed the signed note to plaintiff, who, upon receiving the note, sent the check to Siddique.

¶ 15 Plaintiff contends that defendant judicially admitted in his amended verified answer and affirmative defense that Siddique brought the funds represented by the check to closing. Paragraph 17 of defendant's amended verified affirmative defense stated as follows:

¶ 16 "Siddique tendered approximately $100,000 at closing on the sale of the property by a check or checks in Siddique's name as a shareholder of the corporation as partial consideration for his subscribed shares in the corporation, the funds for which originated with plaintiff."

¶ 17 A judicial admission is a deliberate, clear, unequivocal statement of a party, about a concrete fact

¶ 18 within the party's peculiar knowledge. *Eidson v. Audrey's CTL, Inc.*, 251 Ill. App. 3d 193, 195

¶ 19 (1993). The term "peculiar" when referring to judicial admissions means that the information must be "without question" within the realm of information actually known to the witness, although not exclusively known to him. *Eidson*, 251 Ill. App. 3d at 196. Here, defendant at trial testified that he might or might not have seen the check at closing; he could not remember. It does not appear that the source of Siddique's funds at closing was a matter peculiarly known to defendant, because the verified amended affirmative defense does not state how defendant came

by the knowledge that the funds originated with plaintiff. If defendant saw the check, then the matter would be within his personal knowledge. However, if someone told defendant that Siddique used plaintiff's funds, then it would not be something within defendant's personal knowledge.

¶ 20

¶ 15

Notwithstanding, Ahmed testified that Siddique's contribution at closing was $100,000. Defendant testified that Siddique contributed in excess of $100,000. The trial court found that the only logical inference was that plaintiff was the source of the $100,000. This evidence, rather than rebutting the presumption of consideration, bolsters it. Defendant admitted at trial that the money Siddique contributed at closing was a benefit to him, and the evidence showed that, as a result of the purchase of the gas station, defendant became a salaried employee and was given a car. Consideration exists where the maker of a note is indirectly benefitted. *Fentress v. Triple Mining, Inc.*, 261 Ill. App. 3d 930, 940 (1994).

¶ 21

¶ 16

The only other evidence bearing on the issue of consideration was that the check was deposited into an account other than the corporate account.[3] This fact does not rebut the

[3] Plaintiff attempts to make much of the fact that he received monthly $2,000 payments, the amount of interest due under the note. The trial court found that these payments were "in satisfaction" of the note, indicating that plaintiff was a lender rather than an investor. However, we

presumption of consideration, because we know that the check was deposited into an account at Heartland Bank on the date of closing, which tends to show that it was used to purchase the gas station. Moreover, Ahmed and defendant testified that some of the monies that were brought to closing were used to fund other ventures in which defendant was involved. According to a settlement statement prepared by defendant's attorney for the closing, $181,250 was due to the seller at closing. Ahmed brought $100,000 to closing; Siddique brought in excess of $100,000 to closing; and defendant brought $45,000 or $50,000 to closing. Those sums exceeded the number needed to close, tending to corroborate the testimony that some of the funds went toward other business ventures in which defendant shared. Either way, the evidence corroborates defendant's testimony that he benefitted from plaintiff's $100,000.

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¶ 1 7

It is defendant's burden to rebut the presumption of consideration with very clear and cogent evidence. *Pedott v. Dorman*, 192 Ill. App. 3d 85, 93 (1989). Here, defendant presented no evidence of what checks were tendered at closing. The only closing document he introduced was a settlement statement prepared by his attorney for the closing, which does not disclose who contributed what toward the purchase of the gas station. Defendant's recollection of the closing was hazy. He thought he might have seen the check. He did not review the documents at closing because the lawyers were busy discussing them. Defendant did not even notice that the deed at closing named the wrong grantee. Finally, defendant admitted

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fail to see how the monthly payments tend to prove whether consideration existed. Defendant's performance cannot establish consideration, only that defendant might have believed at the time of the payments that the contract existed. Plaintiff does not argue that defendant is estopped from denying the existence of a valid contract because of the monthly payments.

that he benefitted from Siddique's contribution at closing.

¶ 23

¶ 18

Defendant's only evidence to rebut the presumption of consideration was that plaintiff made out the check to Siddique, not defendant. Yet the evidence showed that defendant, Ahmed, and Siddique were equal business partners engaged in for-profit ventures, including purchases of gas stations and a motel. As the trial court found, the three never observed any corporate formalities. Thus, the corporation may have been only a "façade" for the shareholders (see *Fentress*, 261 Ill. App. 3d at 938), meaning that any benefit accruing to the corporation really accrued to defendant, Ahmed, and Siddique personally. Consequently, even if the check was used in part to purchase one of the other ventures, defendant benefitted from the transaction.

¶ 24

¶ 19

The evidence strongly indicated that the shareholders needed the money from plaintiff in order to purchase the gas station in Normal. Indeed, plaintiff testified that they were "desperate." This indicates that plaintiff's money not only was desired, but that it was needed and used, to purchase the gas station. Plaintiff was willing to loan them money only with someone's personal guaranty, which gave rise to defendant's execution of the note. Plaintiff made the check payable to Siddique because he wanted to make sure it went toward the purchase of the Normal gas station. Thus, the check, and the funds represented by the

check, were to benefit not only Siddique but defendant and Ahmed also, a fact that defendant acknowledged. The objective, which turned out not to be realized, was that the various business ventures would be successful and enrich each of the participants.

¶ 25

¶ 20

Plaintiff's reliance on *Fentress* is apt. In *Fentress*, the plaintiff gave Perry Enterprises a check for $10,000 for the benefit of the defendants to secure permits for a coal venture in which the defendants were involved with Perry Enterprises. *Fentress*, 261 Ill. App. 3d at 940. The defendant, Triple Mining, Inc., executed a promissory note in the amount of $10,000 in favor of the plaintiff. *Fentress*, 261 Ill. App. 3d at 933. The court pierced Triple Mining, Inc.'s corporate veil and held the individual defendants liable on the note. *Fentress*, 261 Ill. App. 3d at 940-41. The court summarily rejected the defendants' contention that the note lacked consideration, holding that consideration exists when a benefit is conferred on a third person or when the maker of the note is indirectly benefitted. *Fentress*, 261 Ill. App. 3d at 940. In *Fentress*, both conditions existed, because the loan agreement was "clearly in furtherance of the joint venture" the individual defendants were pursuing. *Fentress*, 261 Ill. App. 3d at 940.

¶ 26

¶ 21

The cases relied upon by defendant are not helpful to him. In *Guzell v. Kasztelanka Café & Restaurant, Inc.*, 87 Ill. App. 3d 381 (1980), the promissory note sued upon was a sham to

induce the Chicago police department to issue a liquor license, and there never was a loan to the defendants. *Guzell*, 87 Ill. App. 3d at 385-86. *Burke v. Burke*, 89 Ill. App. 3d 826 (1980), actually supports plaintiff's case. In *Burke*, the court held that consideration existed where part of the proceeds of the note were used for a purpose desired by the defendant. *Burke*, 89 Ill. App. 3d at 828. Here, defendant clearly desired that the purchase of the gas station take place and that the other ventures be funded. Unlike *Guzell*, here, plaintiff actually gave Siddique a check for $100,000 toward the purchase of the gas station. Accordingly, we hold that the trial court's finding that there was no consideration was against the manifest weight of the evidence.

¶ 2 7

¶ 2 2

Because the trial court found that no valid obligation existed, it did not consider the issue of damages. We remand this matter to the trial court with directions to enter judgment in favor of plaintiff and against defendant. Then, on the existing record and without reopening proofs, we direct the trial court to determine what amount of damages, if any, plaintiff proved. The trial court is further directed to determine, on the existing record, whether plaintiff is entitled to any amount of attorney fees and costs.

¶ 28 ¶ 23 III. CONCLUSION

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¶ 2 4

For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed

and this matter is remanded for further proceedings consistent with this order.

¶ 30 ¶ 25 Reversed and remanded with directions.